(3)

Supreme Court, U.S.
FILED
MAR 29 2001
CLERK

No. 00-1249

In the

Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WAYNE B. GIAMPIETRO
MICHAEL J. MERRICK
WITWER, POLTROCK
& GIAMPIETRO
125 S. Wacker Drive
Suite 2700
Chicago, Illinois 60606
(312) 332-6000

RICHARD L. WILSON
Counsel of Record
3610 Dubsdread Circle
Orlando, Florida 32804
(407) 649-9225

Attorneys for Petitioners

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE CONFLICT AMONG THE CIRCUITS IS NOT LIMITED TO ADULT ENTERTAINMENT LICENSING CASES 1

II. THIS COURT MUST CONFIRM THAT CONDITIONING SPEECH UPON RECEIPT OF A GOVERNMENT PERMIT IS A PRIOR RESTRAINT .. 5

III. THE PARK DISTRICT'S ACTIONS IN THIS CASE DEMONSTRATE THE NECESSITY FOR FACIAL CHALLENGES TO PERMIT SCHEMES 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Adderley v. Florida,
385 U.S. 39, 47 (1966) 9-10

11126 Baltimore Blvd., Inc. v. Prince George's County
58 F.3d 988 (4thCir. 1995) 3

Baby Tam & Co., Inc. v. City of Las Vegas
154 F.3d 1097 (9th Cir. 1998) 4

Beal v. Stern
184 F.3d 117 (2nd Cir. 1999) 2, 4, 6

Boss Capital, Inc. v. City of Casselberry
187 F.3d 1251 (11th Cir. 1999) 4

Cannabis Action Network, Inc. v. City of Gainesville
231 F.3d 761 (11th Cir. 2000) 2,3,5

City News & Novelty, Inc. v. City of Waukesha
___ U.S. ___, 121 S Ct 743(2000) 1

City of Lakewood v. Plain Dealer Publ. Co.,
486 U.S. 750, 758 (1988). 9

Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,
473 U.S. 788 (1985). 10

Elrod v. Burns,
423 U.S. 347 (1976). 9

Fernandes v. Limmer,
663 F.2d 619 (5th Cir. 1981), cert. denied
458 U.S. 1125 (1982) 2

Florida Cannabis Action Network, Inc. v. City of Jacksonville
2001 WL 245714 (M. D. Fla., March 8, 2001). .
. 2-3

Forsyth County v. Nationalist Movement
505 U.S. 123, 131 (1992) 7

Freedman v. Maryland
380 U.S. 51 (1965) 1-5

FW/PBS, Inc. v. City of Dallas
493 U.S. 215 (1990) 1

Graff v. City of Chicago
9 F.3d 1309 (7th Cir. 1993). 6

Greer v. Spock,
424 U.S. 828, 836 (1976) 9

Hague v. CIO
307 U.S. 496, 515 (1939) 10

Jews for Jesus, Inc. v. Mass. Bay Transportation Auth.,
984 F.2d 1319 (1st Cir. 1993). 2,4

MacDonald v. City of Chicago,
2001 WL 241591 (7th Cir. 2001) 3, 5-7, 9

MacDonald v. Safir
206 F.3d 183 (2nd Cir. 2000) 2,4

Nationalist Movement v. Forsyth County
505 U.S. 123 (1992). 7

Nightclubs, Inc. v. City of Paducah,
202 F.3d 884, 892 (6th Cir. 2000) 3,6

Perry Education Ass'n. v. Perry Local Educators' Assn.,
460 U.S. 37 (1983). 10

Rosen v. Port of Portland,
641 F.2d 1243 (9th Cir. 1981). 6

Schneider v. State,
308 U.S. 147, 163 (1939) 10

Shuttlesworth v. City of Birmingham,
394 U.S. 147 (1969). 5,6,10

Southeastern Promotions, Ltd. v. Conrad
420 U.S. 546, 562 (1976). 6

Thomas v. Chicago Park District,
227 F. 3d 921, 926 (7th Cir. 2000) 2,5

TK's Video, Inc. v. Denton County
24 F.3d 705 (5th Cir. 1994) 4

ARGUMENT

The Chicago Park District claims that this Court need not be concerned about the split among the circuits on the issue of prompt judicial review when a case involves core political speech. Like the court below, it suggests that political speakers, often espousing views at extreme odds with the very governmental agencies that control their ability to appear in public fora, do not need *Freedman*'s protections. The Park District would have this Court leave intact the Seventh Circuit's opinion reserving *Freedman*'s procedural safeguards for only sexually explicit speech.

Aside from being a horrible proposition of law, the Park District's position is in error. *Freedman* has long been applied to core political speech cases by this Court, as well as many others. Some, however, like the court below, have sought to restrict its application. These differing results beg for this Court's resolution.

I. THE CONFLICT AMONG THE CIRCUITS IS NOT LIMITED TO ADULT ENTERTAINMENT LICENSING CASES

The Park District concedes, as it must, that there is a split among the circuits on the application of the procedural safeguards mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965) and reiterated in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). However, it claims those safeguards do not apply to situations involving political speech, but only to cases involving sexually-oriented "adult" businesses, purportedly relying upon this Court's recent statements in *City News & Novelty, Inc. v. City of Waukesha*, ___ U.S. ___, 121 S Ct 743 (2001). Park Dist. Brief at 11.

To the contrary, the *Freedman* doctrine was always meant to apply to all manner of speech cases. The Fifth Circuit struck the Dallas-Fort Worth International Airport solicitation ordinance because it failed to include *Freedman*'s procedural safeguards. *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), *cert. denied*, 458 U.S. 1124 (1982). The First Circuit applied the same *Freedman* requirements to religious handbilling in *Jews for Jesus, Inc. v. Mass. Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993). *Freedman* was the issue in two Second Circuit cases cited to the Court in the Petition, both involving core political speech virtually identical to that involved in this case: *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999) and *MacDonald v. Safir*, 206 F.3d 183 (2nd Cir. 2000). The Eleventh Circuit applied *Freedman* in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), another core political speech case. The court below is at odds with all of these cases when it seeks to restrict *Freedman* procedures to adult entertainment.

And the conflict continues to grow. In a recent decision, the United States District Court for the Middle District of Florida discussed the Seventh Circuit's opinion in this case. In *Florida Cannabis Action Network, Inc. v. City of Jacksonville*, 2001 WL 245714 (M. D. Fla., March 8, 2001) the Court said:

> The City cites a recent decision by a panel of the Seventh Circuit in *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000) as supporting the proposition that the *Freedman* safeguards should be limited to licensing regimes that censor specific content, such as adult entertainment.
>
> * * *

> Although *Thomas* presented facts and circumstances similar to this case, this Court respectfully disagrees with the Seventh Circuit's reasoning in that decision. . . . More importantly, the *Thomas* decision is inconsistent with the Eleventh Circuit's holding in [*Cannabis Action Network, Inc. v.*] *City of Gainesville*, which is binding authority on this Court.
>
> 2001 WL 245714 at *7-8 (footnote omitted).

There is yet another case involving core political speech in a traditional public forum, again from the Seventh Circuit, involving these same Petitioners, and these same issues. On March 12, 2001 the Seventh Circuit decided *MacDonald v. City of Chicago*, 2001 WL 241591 (7th Cir. 2001), upholding Chicago's parade permit ordinance. With a partial dissent, the panel concluded that the ordinance satisfied *Freedman*, even though it did not provide for prompt judicial disposition, did not require the City to initiate judicial review and did not require the City to bear the burden of proof in that proceeding. The court noted the conflict among the circuits:

> The circuits are split on this issue. The Fourth, Sixth and Ninth Circuits have held that prompt judicial review requires a prompt decision on the merits. *11126 Baltimore Blvd.*, 58 F.3d at 1000-01 ("prompt judicial review" requires "prompt judicial determination"); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892 (6th Cir. 2000) ("[T]his Circuit and a number of other circuits have held that a licensing scheme must reasonably ensure a prompt judicial determination, and not mere access to judicial

review."); *Baby Tam & Co., Inc.*, 154 F.3d at 1101 ("'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer"). Conversely, the First, Fifth and Eleventh Circuits have held that for permit and licensing ordinances, prompt judicial review only requires access to prompt judicial review. *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993) ("prompt judicial review" is provided where applicant may appeal license denial in court); *TK's Video, Inc.*, 24 F.3d at 709 (holding that ordinance which gives an unsuccessful license applicant 30 days to appeal to the district court satisfies the "prompt judicial review requirement"); *Boss Capital, Inc.*, 187 F.3d at 1256 (for licensing ordinances, prompt judicial review only means access to prompt judicial review)./6

2001 WL 241591 at *13.

In footnote 6 the panel said:

It is unclear exactly where the Second Circuit stands. Compare *Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999) ("prompt access to judicial review in state courts would satisfy *Freedman*") (emphasis added), with *MacDonald v. Safir*, 206 F.3d 183 (2d Cir. 2000) (noting that *Beal* held that "prompt access to judicial review in state courts would satisfy *Freedman*," but concluding that the record was insufficient to determine whether available state court proceedings satisfied that requirement).

2001 WL 241591 at *13, n. 6 [1]

The split among the circuits is having an ongoing and serious impact on core political speech in traditional public fora, and needs to be resolved by this Court at the earliest possible time.

II. THIS COURT MUST CONFIRM THAT CONDITIONING SPEECH UPON RECEIPT OF A GOVERNMENT PERMIT IS A PRIOR RESTRAINT

The court below and the Park District contend that an ordinance requiring one to obtain a permit before speaking in a public park or on the public ways is a prior restraint only when it explicitly permits licensing authorities to restrain speech on the basis of its content. *Thomas v. Chicago Park District*, 227 F.3d 921, 926 (7th Cir. 2000); Petition for Certiorari, App. 9a; Respondent's Brief, p. 9. This "formulation" is not correct. It is a distortion of this Court's holdings.

Any governmental regulation which requires a speaker to obtain governmental permission before speaking is a prior restraint. *Shuttlesworth v. City of Birmingham*, 394

---

1. The Seventh Circuit panel, in concluding that it was in line with the Eleventh Circuit, failed to mention the opinion in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F 3d 761 (11th Cir 2000). That case said the issue of what constitutes prompt judicial review is unresolved in the Eleventh Circuit in core political speech cases. Petitions for certiorari will be filed in both *Cannabis Action Network* and *MacDonald v. City of Chicago*.

U.S. 147 (1969); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1976). Several circuits have explicitly held that any scheme which allows the government to either allow or deny an individual access to be heard in a public forum is a prior restraint. *Beal v. Stern,* 184 F.3d 117 (2nd Cir. 1999); *Nightclubs, Inc. v. Paducah*, 202 F.3d 884 (6th Cir. 2000); *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981).

While the Park District contends that the Court of Appeals correctly applied a time, place and manner analysis to this situation, the decision below is directly in conflict with these cases, as well as many others. The Court of Appeals for the Seventh Circuit is not as sanguine regarding the correctness of its position as is the Park District. In a subsequent divided decision in another case presenting many of these same issues, involving the same Plaintiffs, the Court specifically reiterated its confusion. *MacDonald v. City of Chicago, supra*. Despite holding that an ordinance which does not place unfettered discretion in the hands of government officials is not a prior restraint, the Court alluded to its previous fractured decision in *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc), and all but asked this Court to grant the Petition in this case to resolve that confusion:

> In recognition of the continuing discussion and debate in the courts and in the legal community at large, Judge Ripple's concurrence noted that "there is a great need for clarification of standards in this area, and I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States. [9 F.3d] at 1335. Although the Court did not review *Graff*, the Court's decisions since then have also not resolved the conflicting analyses.

> *MacDonald v. City of Chicago, supra*, 2001 WL 241591 at *8, n. 4.

This Court should grant the Petition for Certiorari in this case to settle, once and for all, what constitutes a governmental prior restraint on speech.

III. THE PARK DISTRICT'S ACTIONS IN THIS CASE DEMONSTRATE THE NECESSITY FOR FACIAL CHALLENGES TO PERMIT SCHEMES

In *Nationalist Movement v. Forsyth County*, 505 U.S. 123 (1992), this Court said "a government regulation that *allows* arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the *potential* for becoming a means of suppressing a particular point of view.'" 505 U.S. at 130 (emphasis added).

In an apparent attempt to convince this Court that political speech is not subject to censorship in Chicago, Respondent asserts that its permit procedure applies only to a "limited and special category of public property" and that it has never sought to prevent a "'spontaneous' rally from taking place, and has in fact allowed such rallies, even without a permit, on a regular basis." (Respondent's Brief in Opposition, pp. 4, 15). Although it was invited to support such a claim, and given an ample opportunity to do so, both the Magistrate Judge and the District Judge found that the Park District failed to present any evidence that it had a practice favoring free speech in the parks. Magistrate Judge Keys found:

> Thus, despite Judge Marovich's Order for the submission of additional evidence, and despite claiming that a hearing was unnecessary, the Park District basically has provided no new evidence to demonstrate a "well-established practice" narrowing construction of the Ordinance. . . . Finally, the Park District's own 12(M)(and Affidavits of Joan Fencik) failed to show evidence that demonstrates a historical practice in its interpretation of the Ordinance, and instead merely parroted the language of the Ordinance or the words "established practice", without providing any context. Therefore, this Court must conclude that there is no well-established practice limiting application of the Ordinance. (Petition for Certiorari, Appendix 62a-63a).

The District Court was even more pointed in its assessment of the Park District's failure to support its claims:

> Magistrate Judge Keys complained about the "dearth of evidence" on this point despite the "numerous opportunities given to the Park District to provide this critical information." . . . This Court must echo Magistrate Judge Keys' frustrations with the Park District on this point. From what this Court can glean, the Park District has gone out of its way to ignore several of the orders of this Court and Magistrate Judge Keys. . . . It should be noted that the present outcome is in spite of, not because of, the Park District's vexatious course of conduct before the Magistrate Judge and this Court. (Petition for Certiorari, Appendix 86a)

A comparison of the Park District's assertion that it freely allows rallies and political demonstrations with its adamant refusal to cooperate in providing any proof of that claim graphically demonstrates why facial challenges to these kinds of permit schemes are necessary if First Amendment protections are to have any meaning. The Park District's conduct in this case illustrates the continuing validity of this Court's observation in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988), that governments often engage in "post hoc rationalizations . . . and the use of shifting or illegitimate criteria . . . making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." In her dissent in *MacDonald v. City of Chicago*, *supra*, Judge Rovner expresses this concern, noting that under Chicago's parade ordinance, the City may surreptitiously suppress unfavorable speech despite the "content neutrality" of its provisions. 2001 WL 241591 at *15. It is because governments consistently engage in such chicanery that facial challenges are necessary to protect our basic freedoms. Such challenges are not merely "semantic nit-picking and judicial usurpation of the legislative drafting function" as the Court of Appeals in this case claims (Petition for Certiorari, Appendix 4a-5a), but the only way the courts have of preventing the irreparable injury which inevitably results from governmental attempts to delay citizens' rights to speak publicly when and where they deem it most efficacious. See *Elrod v. Burns*, 423 U.S. 347 (1976).

CONCLUSION

Petitioners readily acknowledge that the Chicago Park District has the "the power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v.*

Florida, 385 U.S. 39, 47 (1966)). However, that power must be exercised within constitutional limits, and must always be extremely sensitive to the needs of those engaged in core political speech when the property is a public forum. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Hague v. CIO*, 307 U.S. 496 (1939); *Shuttlesworth v. City of Birmingham*, 394 U.S.147 (1969). The Park District's claim that its ordinance "endeavors to preserve the public parks for their primary intended uses, *but leaves applicants free to demonstrate elsewhere*," is an insult to the First Amendment and all it represents.[2] That claim must be soundly rejected. This Court should grant review in this case.

Respectfully submitted,

Richard L. Wilson, *Counsel of Record*
3610 Dubsdread Circle
Orlando, Florida 32804
407.649.9225

Wayne B. Giampietro
Michael J. Merrick
Witwer, Poltrock & Giampietro
125 S. Wacker, Suite 2700
Chicago, Illinois 60606
312.332.6000

Attorneys for Petitioners

---

2. Apparently the Park District disagrees with this Court's statements that "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).